CHAPTER 10

LIBEL, RIGHT OF PRIVACY, FREEDOM OF INFORMATION AND COPYRIGHT

Is the First Amendment of the U.S. Constitution the same to a reporter as an umpire's "call 'em as I see 'em" license? Is the new city official really a crafty, communist sympathizer?

To the grief of many a publisher and reporter, there is no absolute license to print whatever one pleases about a private citizen or about the government.

Free speech and free press, as guaranteed by the Constitution, have two sides: on one side, the right to use them; on the other, the duty not to abuse them. When the news media abuses its right to a free press, they commit an age-old offense known as libel — the defamation of a person's reputation.

Because your job is to write about the Navy, you should become acquainted with the danger of defamation. This chapter provides information on what you should guard against when releasing material to the news media or publishing it in internal publications. It also acquaints you with the right of privacy and some of the laws of copyright.

LIBEL AND SLANDER

LEARNING OBJECTIVE: Define libel and slander; identify how libel is committed and determine who is responsible for a libelous story.

Libel is a difficult offense to describe. Libel laws are state laws, and there are differences in the definitions of libel from state to state. For the purposes of this training manual, we will define libel as follows:

> *Libel is a published (written, printed or pictured) defamation that unjustly holds a person up to ridicule, contempt, hatred or financial injury.*

All states agree that libel is a **defamation,** an act that tends to degrade or lower a person in the eyes of others. The effects can subject a person to ridicule, hatred or contempt (or all three), or they can cause a person financial injury by hurting the person's property or business or by causing loss of employment.

As you can see, defamation does not have to be sensational to be libelous. A picture with the people erroneously identified in the caption can be libelous. A newspaper headline, even if the story under it is blameless, can be libelous.

Radio and television are not exempt from libel laws. A picture on television can be as libelous as one printed in a newspaper. A radio broadcast can defame an individual, although there is some dispute in the courts as to whether the offense would be libel or slander. Slander differs from libel chiefly in that it is spoken instead of printed, written or pictured. In other words, slander is defamation by oral communication. A major distinction between libel and slander is found in the word "published." Since slander is an oral defamation, the courts tend to view it as a lesser offense than libel because the words, once uttered, are quickly gone. Libel, on the other hand, is a published wrong and is felt to endure longer and thus cause greater injury. Consequently, the law is much stricter in dealing with libel cases than with slander claims.

However, the subject becomes a bit cloudy when oral remarks (slander) are read from a written script or when they are recorded. Therefore, you should exercise equal care to avoid both oral and written defamatory statements.

True statements about a person also can be libelous. Many people think that libel results only from untruths told about another. This is not so. The truth can sometimes defame an individual as much as a lie.

A simple defamation, however, is not always libel. The following are three conditions that are necessary before a statement becomes libel:

- There must be a **true defamation.** In other words, a person's character or property must in some way be degraded.
- There must be **clear identification** of the person. This identification, however, does not have to be by name. A writer (or an artist) can very easily leave no doubt in the public's mind as to a person's identity without mentioning the individual's name. Even if only a few persons

were to realize the person's identity, libel is still possible.

- The libel must be published. This does not mean that it must be printed in a newspaper. You will recall from the definition that libel can be written (as in a letter that is seen by a single third person) or it can be pictured (as in a photograph or cartoon). Spoken libel, or slander, is also considered by the courts to have been published. As a Navy journalist, you will not have to concern yourself too much about the legal and technical differences between libel and slander. It is sufficient to know that any defamation may be considered unlawful, regardless of whether it is written or spoken. One of your jobs is to make sure that defamatory statements do not reach print or the airwaves through a Navy news release.

Libel, as an offense, is almost as old as civilization. Many early societies punished those who would harm the name or reputation of another. Decimation before the invention of printing almost always took the form of slander. An early code of Egyptian law recognized slander as an offense against the sun god.

After the invention of printing, libel became very closely related to freedom of the press. Through history, governments have taken various and often harsh views of a free press. For centuries, the struggle for some measure of press freedom was an uphill battle. Much of the trouble encountered in striving for press freedom revolved around the fact that for a long time governments considered any adverse criticism or comment to be libelous. Thus rulers went as far as to imprison or put to death writers who had criticized them in print. Even today, in some countries, too much of the wrong kind of criticism can mean a newspaper will be closed.

A balance between ruthless suppression and license was struck by the U.S. Constitution, and the courts have strengthened this balance in the intervening years. Today, as one writer says, freedom of the press and speech is "the first principle of the Anglo-American legal structure." He goes on to say these freedoms are a "specific legal principle defining the relationship, in a democracy, between the people and their elected representatives."

Libel laws exist because the free press is a two-way street There are obligations that accompany the rights of freedom of speech and press. The managers of a respectable news medium obey the libel laws not merely because they wish to avoid being sued but because they believe in the dignity of the individual.

HOW LIBEL IS COMMITTED

If news media commit libel today, it generally occurs in one or more of the following areas:

- Attacking a person's character or personal reputation
- Accusing someone of a loathsome disease or insanity
- Accusing someone of a crime
- Attacking a person's professional competence
- Subjecting a person, in any way, to public contempt, hatred or ridicule

Instances of libel are more common than most people suspect, and court action does not have to result before a statement becomes libelous. There are hundreds of instances of libel everyday in the United States news media. The vast majority of them are minor or borderline cases, and most of the more serious ones go unnoticed or uncontested. There are relatively few court actions for libel.

RESPONSIBILITY FOR LIBEL

Let's assume that you write a story and accidentally include a statement that offends somebdy. The person offended sues for libel. Who is responsible? Who pays? A casual observer might think that in a suit against a large newspaper, any damages will be paid by the medium publishing the story. This is not necessarily so.

Technically, everybody who had anything to do with the statement may be sued. This includes you, the PAO who released it, the officer in command who is responsible for everything you release, the editor who accepted it, the editor who approved it and anybody else in the chain of events who read it, understood it, yet allowed the statement to reach print.

Another point worth emphasizing is that any person who reprints a libelous statement can be held as being just as guilty as the person who originally published it. For example, assume that one newspaper publishes a libelous statement. Another newspaper picks up the story, credits the first newspaper with the facts and republishes it. The second newspaper may be just as guilty as the first, if the case reaches court and libel is proved. In some states, charges maybe brought against both newspapers.

Wire services are similarly liable. Occasionally, a newspaper will publish a wire service story that is libelous and the newspaper cannot or does not verify the facts in the story. Despite the circumstances, some states hold that the newspaper is just as responsible as the wire service, while other states place the blame solely on the wire service. Nevertheless, a person can name anyone in a lawsuit who had anything to do with the preparation of the story or its distribution.

TYPES OF LIBEL

LEARNING OBJECTIVE: Identify the different types of libel.

There are two kinds of libel — obvious libel and libel by inference (hidden libel), refereed to in law as **libel per se** and **libel per quod,** respectively. Do not let yourself become confused by the Latin terms.

LIBEL PER SE

The more obvious of the two, libel per se, means "by itself" or "on the face of it." The reader or viewer does not have to interpret or study in order to understand the libel per se because it is obvious or evident. Libel per se is the more serious of the two types, and persons libeled in this manner do not have to prove that they suffered damage to their reputations, monetary loss or other injury. Libel per se can support a lawsuit in itself.

There are probably thousands of words, phrases and statements in the English language that are libelous in themselves. Some of them are of a political nature, others refer to race or religion and still others involve specific professions and occupations. Others (and this is no doubt the largest group) affect the honesty, integrity or morals of anyone to whom they are applied.

Here are just a few examples of words and phrases you should **not** use in reference to individuals or groups:

- **Professionals.** Attorney: shyster, ambulance chaser, crafty, unprincipled, and slick Business person: swindler, racketeer, double-dealer, cheat, and phony. Politician: liar, grafter, perjurer, seller of influence, pocketer of public finds, and criminal's partner. Doctor: quack abortionist, faker, and incompetent. Also, never use such words as crooked and criminal to descibe people or their behavior.
- **Affiliations.** Red, Communist, Nazi, a member of the Ku Klux Klan, atheist, nudist and socialist (sometimes).
- **Honesty and Morals.** Unreliable, a credit risk, hypocrite, adulterer, unchaste, prostitute, drunkard, conspirator, mistress and thief.

Obviously, there can be many more classifications of words and phrases that are libelous in themselves. For example, a word like "drunkard" can have numerous synonyms, all just as libelous, and the same thing applies to most of the nouns and adjectives in the preceding list.

Another point worth considering is that the meanings of words and phrases can and do change. Over a period of years the meaning of a word or phrase can shift gradually until it is no longer libelous in itself or libelous at all. The reverse also is true. A word or phrase harmless a few years ago maybe libelous in itself today.

A word that has almost entirely lost a previous libelous per se meaning is "alcoholic." A few years ago the word was synonymous with "drunkard," but today ir refers to an illness — alcoholism. Words of this type, however, should still be used with caution.

As for a word's meaning changing from a safe description to a libelous one, do you remember when "gay" meant happy and carefree?

In a libel suit, if the defamatory material is libelous in itself, the court decides on the interpretation of the words and phrases involved; the news medium does not. If the court decides the material can be understood as libelous by the public, the publisher involved has no argument.

LIBEL PER QUOD

The second type of libel is committed by inference and is more "hidden." Its legal term, libel per quod, means "because of circumstance" or "by means of circumstance." In libel per quod, the statements, words or phrases involved maybe harmless in themselves, but become libelous because of attached circumstances. Usually, such circumstances are unforeseen by the publisher, who can claim that the questionable material was published in good faith and without malice. However, good faith is not a complete defense.

Here is a classic example of libel by circumstance: A news story reported an athlete's spectacular feats on the tennis court the previous Saturday. In fact, the tennis match was on Friday, not Saturday; a simple error. However, the story was libelous per quod because the

athlete in question belonged to a religion that observes Saturday as the Sabbath — a day of quiet and meditation. The story, as it was printed, defamed the athlete as not being a devout member of his church.

Libel per quod is the most common of all libels. Very few publishers intentionally undertake the risk involved in printing material that is obviously libelous. However, libel per quod often occurs because of errors or negligence. There are countless other examples of libel by circumstances — wrong names, wrong addresses, and so forth.

Libel by circumstances also may result from what the reader may infer. In a story appearing in a national magazine, a man was described as being a legislative representative (lobbyist) for the Communist Party. The man charged in a suit that this statement damaged his reputation because it implied he was a communist sympathizer. Whether the man was, or was not, a communist sympathizer or a lobbyist for the party was beside the point. The man claimed he had been defamed, and his claim was upheld by a federal appeals court.

"Guilt by association" also is a form of libel per quod This form of libel, sad to say, has been employed for many years by unscrupulous politicians and others seeking positions of power.

Perhaps the most obvious use of this method has been the linking of various persons to the Communist Party by innuendo. During a political campaign in the west several years ago, pamphlets appeared describing a U.S. senator who was running for re-election, as being friendly toward communist aims. One of the principal items of evidence given to support this claim was the fact that the senator had participated in a pre-World War II meeting during which Russia and Stalin were praised as foes of Nazi Germany. The pamphlets were clearly an example of circumstantial libel — what the reader might infer. The intent of the writers of the pamphlet was apparently to damage the senator's reputation in order to injure his election prospects.

LIBEL AND THE LAW

LEARNING OBJECTIVE: Recognize the laws that apply to civil and criminal libel and the defenses against libel action.

We have pointed out that the laws of libel are state laws, unlike the U.S. Constitution or other national laws that bind **all** U.S. citizens. Libel laws vary from state to state with each state free to make changes in its libel code whenever it chooses. As a result, there is little uniformity among the states regarding award of damages or the nature of judgments in similar types of libel cases.

The state laws of libel are complex and can be understood thoroughly on1y by an attorney or a person trained in this field. In this section of the chapter, we only describe some of the "ground rules" that generally apply in all states.

There are two types of legal action that can result from publication of libelous material: **civil action** and **criminal action.**

CIVIL LIBEL ACTION

Civil libel action results when one person sues another in court because of alleged defamation. This defamation, again, need not be to the' individual's character or reputation. It can be to a person's business, occupation or property.

Civil libel also can be committed against a legal "person" composed of more than one individual. In this regard, a corporation, a partnership or any other association of individuals can be defamed General Motors could sue an individual for defaming its products or business practices. Also, an individual could sue General Motors. One corporation also can sue another corporation.

Individuals cannot sue the U.S. government, however, unless it consents to the suit. When people feel they have been libeled by an agency of the government, they still cannot bring suit unless the government agrees to be sued.

Civil libel suits are always between persons, whether the "person" is an individual, an association of individuals or an artificial being, such as a corporation. A sum of money is the usual compensation awarded by civil courts for damages. The amount has varied from one cent, a nominal sum to indicate vindication, to millions of dollars.

Money awarded in libel cases is intended to compensate the injured party for mental or physical suffering and for actual financial loss and to punish the individual or individuals who committed the libel.

CRIMINAL LIBEL ACTION

Criminal libel action is less common than civil libel action, but it is much more serious. Criminal libel is a crime and can be prosecuted in the courts like any other crime. In criminal libel the state 'is the accuser and the

punisher. Persons convicted of criminal libel can be fined, imprisoned or both, depending on the gravity of the offense.

Any libel that tends to disturb public peace and order can be a criminal offense. For instance, if a popular public figure were to be libeled to the extent that riots resulted, the libel would be of a criminal nature. Obscene libel can be a criminal offense because it is considered to have an ill effect on public morals.

One of the most grave types of criminal libel is seditious libel — that which defames an established government, or one of its agents, in an attempt to thwart or overthrow it. Criminal libel, if directed at the U.S. government, becomes a federal offense and can result in a long prison term for the libeler. Seditious libel is rare, but it has occurred in cases when news organizations or individuals have written violent defamations of the government in their opposition to federal laws or the decrees of federal courts. Mere opposition to a court decree is not necessarily libelous (though it could be seditious). Remember, there is no libel involved until there is defamation.

DEFENSES AGAINST LIBEL ACTION

An individual, a newspaper or other news organization is not without some degree of protection when being sued for libel. In the following text, we cover some of the partial and complete defense strategies that might lessen the damages assessed against a defendant in a libel suit.

Partial Defenses

There are eight basic partial defenses against libel action, as covered in the following text.

INNOCENT MISTAKE/ACCIDENT.— The first mitigating factor to consider is innocent mistake, or accident, which appears in the libel codes of most states. Almost self-explanatory, it means that a defendant can be excused partially if it can be proved the libelous material was published unintentionally or without the publisher realizing it was defamatory. The "innocent mistake" law does not remove liability, but it may reduce it.

RETRACTION, APOLOGY OR CORRECTION.— A retraction, apology or correction, usually printed with the same prominence as the original libelous material, will sometimes satisfy a person who claims to have been libeled. Nevertheless, the libeled party still retains the right to bring suit. Although retractions, apologies and corrections are three separate (partial) defenses, they are related and often overlap. A retraction is often accompanied by a correction when it is employed, and both, almost always, are accompanied by an apology. One disadvantage of a retraction, or apology, is that it puts the original defamatory remark before the public eye again, although hopefully, in a much nicer form.

An example to the contrary is this story about a southern editor of a few years ago: The editor was bitterly opposed by certain people in the town and did not hesitate to become quite harsh on them in print. One man insisted he had been libeled and demanded a retraction. The next issue of the paper appeared with the following line in large type:

JOHN GREEN IS NOT A BRAYING ASS

In that example the editor successfully and wittily continued his feud; but regrettably, he also compounded the original libel.

REPETITION.— The defense of repetition can be used when a newspaper uses a libelous story that has been printed elsewhere, in a wire service article for example. In a number of recent court decisions, newspapers were not held responsible for libels committed by wire services, since it was recognized that editors could not possibly check out every story received from those sources.

LACK OF MALICE.— In the lack of malice defense, punitive damages are usually not awarded if the publisher can demonstrate good faith and justifiable ends.

SELF-DEFENSE/REPLY.— A self-defense or reply defense can sometimes be successful if the publisher can show that the libel was a response to a previous attack made by the person claiming libel.

UNCONTRADICTED RUMOR.— The uncontradicted rumor defense can sometimes serve to lessen the damages that could be awarded in a libel case if the publisher can show that the libel was merely a published version of widely circulated rumors that the plaintiff had made no effort to deny.

USE OF AUTHORITY.— In employing the use of authority defense, a publisher would try to show that the libel originated from a source that could reasonably be expected to be accurate. A successful presentation of this defense, while not exonerating the publisher, could serve to lessen the damages awarded.

PRIOR BAD REPUTATION.— A prior bad reputation defense might prove useful to a publisher accused of libel if it could be shown that the plaintiff already had an unsavory standing in the community and the defamatory statement caused very little additional injury.

Keep in mind that these partial defenses are just that — partial. They may lessen punitive damages, or in some cases eliminate them, but they do not excuse the libel charge.

Complete Defenses

The seven complete defenses against libel charges can absolve the publisher of all liabilities if successfully used. Incidentally, it is important for you to note that in libel cases, unlike other cases tried in our country's judicial system, the burden of proof is on the accused, not on the plaintiff or the prosecution.

TRUTH.— Truth is the best complete defense against libel action. Some state laws read that truth alone will suffice as a defense in a civil libel suit; others maintain that the truth must be "without malice." In either case, the facts published must be provably true.

If the law requires "truth without malice," the defendant also must prove good intentions. Malice, however, as judged by the courts today, does not mean only "intent to harm." The consensus appears to be that "truth without malice" must be "truth for a good reason." The good reason is usually judged by determining if the material presented is in the best interest or concern of the public.

For example, a newspaper prints a story about a man running for a high public office and states that the candidate has served a prison term for embezzlement. The statement is true, and the newspaper's reason for printing it is the belief in the public's right to know, or the "public good." The candidate's history, in this instance, would give reasonable doubt of his qualifications for public office.

If, however, the same statement had been made about a private citizen who was in no way connected with the public welfare, there would have been no "good reason" for publishing that information.

FAIR COMMENT AND CRITICISM.— A publisher can claim the fair comment and criticism defense in many instances. The courts are often lenient when fair comment or criticism is made of a political organization or any powerful corporation; in reviews of television programs, movies, plays and books; or in articles dealing with officials or agencies of the U.S. government. It has been established that one of the chief functions of the news media is to serve as a critic of the wielders of public or private power. The courts reason that this function should not be arbitrarily suppressed.

Many newspapers engage in "crusades" against a dishonest or bungling government and against crooked gambling or other criminal activities. As long as a newspaper approaches such a "crusade" in a responsible manner, it is well within its rights. Every year Pulitzer Prizes are given to individual reporters for either having exposed private or public abuses of power, and in some cases, having caused their confections.

PRIVILEGE.— Privilege, as a defense against libel, deals with legislative and judicial operations. There are two kinds of privilege. One is "absolute privilege"; the other is "qualified privilege."

Absolute Privilege.— Absolute privilege protects those directly involved in judicial proceedings (judges, attorneys and witnesses) and legislative matters (the President, governors, mayors and lawmakers at the federal, state, county and city levels). Absolute privilege does not apply to the news media.

Qualified Privilege.— Qualified privilege does apply to the news media and affords them qualified, or conditional, protection in reporting public and official proceedings. The conditions for this protection are that a story must be characterized as follows:

1. Fair, accurate and complete
2. Without malice
3. Published for justifiable ends

The one limitation of qualified privilege is that a story must not include any obscenity. Other than that, legislative and judicial proceedings may be reported in their entirety, regardless of the truth or falseness of what is said. The legal theory supporting this license holds that the public interest in public matters should be served, even at the expense of individual defamation.

Remember, however, that this privilege does not cover the reporting of conventions of private organizations, such as political parties, labor unions and churches.

LACK OF PUBLICATION.— Lack of publication as a complete defense is more likely to be used in a libel case involving some form of personal communication that may or may not have been seen by a single third party. This defense could hardly serve the

needs of a newspaper publisher whose product is seen by large numbers of people.

LACK OF DEFAMATION.— The lack of defamation defense is used when a publisher believes that no one has been defamed; and therefore, if it can be proved, there is no basis for a libel suit.

CONSENT.— Consent, as a libel defense, is used by a publisher when it can be shown that the person claiming libel previously consented to the statement that is now being challenged.

STATUTE OF LIMITATIONS.— Statute of limitations, as a complete defense against libel, means that a libel action was not brought within a maximum period of time as specified bylaw. The time limit varies from one year from the date of publication, in some states, to as many as three years in others. Beyond whatever deadline is established, no suit maybe filed.

THE PRIVACY ACT

LEARNING OBJECTIVE: Identify the basic provisions of the Privacy Act.

All Navy journalists must have a working knowledge of the Privacy Act (PA) of 1974. The PA is an enclosure to the *Department of the Navy Privacy Act (PA) Program,* SECNAVINST 5211.5 series.

PRIMARY FEATURES

Under the PA, government agencies may collect, store, disclose, account for and amend required personal information on military and civilian government employees. Additionally, individuals may request access to information about themselves. In the Navy, personal information may be collected and stored in roughly 200 PA record systems. An example of such a system is the Navy Civilian Personnel Data System (NCPDS).

The premise of the PA is simple. Everyone has a constitutional right to privacy. People do not waive that right simply because they are in the military or work for the government. Therefore, when you write a story about a person, there are a limited number of facts that may be released without the permission of that person.

RELEASABLE INFORMATION — MILITARY

In the case of a military person, the following facts may be released:

- Name
- Rank
- Date of rank
- Gross salary
- Present and past duty assignments (subject to limitations addressed in SECNAVINST 5211.5 series)
- Future assignments that are officially established (subject to limitations addressed in SECNAVINST 5211.5 series)
- Office or duty telephone numbers
- Source of commission
- Promotion sequence number
- Awards and decorations
- Attendance at professional and military schools (major area of study, school, year of education and degree)
- Duty status at any given time

RELEASABLE INFORMATION — CIVILIAN

When releasing information about government civilian employees, you may include the following facts without approval from the individuals concerned:

- Name
- Grade or position
- Date of grade
- Gross salary
- Present and past assignments
- Future assignments, if officially established
- Office telephone number

The point for you to remember is that, without a compelling reason that is usually in connection with the public concern, a person's privacy should not be violated. For you to pry into an individual's home life in connection with a news story is inexcusable unless there is some clear public need for the information. On the other hand a person cannot claim the right of privacy if an important news event has placed an individual, willingly or unwillingly, in public view. Even so, this

does not give the news media the right to push human dignity and decency aside.

Additional information on the PA may be found in SECNAVINST 5211.5 series or in *PA Regs,* Chapter 7.

THE FREEDOM OF INFORMATION ACT

LEARNING OBJECTIVE: Identify the basic provisions of the Freedom of Information Act.

The Freedom of Information Act (FOIA) was established in 1966 to give the public the right to access records of the executive branch of the federal government. It established for the first time in U.S. history the right of "any person" to seek access to these records.

More than 40,000 FOIA requests are received annually from organizations and individuals. Requests center on the programs and activities of the DoD, including (but not limited to) the following:

- Projected retirees
- Decklogs
- Investigations
- Contracts
- Nuclear weapons
- Disposal of toxic substances

AGENCY RECORDS

The FOIA provides for access to U.S. government "agency records" — simply stated, products that result from the gathering of data. They may include records originated by the agency or those it has received and maintained at the time of the FOIA request. Some examples of agency records include the following:

- Books
- Papers
- Maps
- Photographs
- Machine-readable materials or other documentary materials regardless of physical form or characteristics

You also must be aware of the records that **do not** qualify for release under the FOIA. Some of these records include the following:

- Objects or articles (such as structures, furniture, paintings, sculpture, three-dimensional models, vehicles and equipment)
- Administrative tools (such as computer software)
- Nontangible records (such as an individual's memory or oral communication)
- Personal records not subject to agency creation/ retention (such as notes to jog the memory of an employee)
- Unaltered publications and processed documents available to the public through other means (such as regulations, maps and manuals)

FOIA REQUEST FORMAT

A request for an agency record under the FOIA must follow a specific format. First, and most important, make sure the request is in writing. Do not process verbal requests, whether in person or on the telephone. Additionally, the request must indicate that it is made under the provisions of the *Department of the Navy Freedom of Information Act (FOIA) Program,* SECNAVINST 5720.42 series, or its parent directives, DoD 5400.7 or DoD 5400.7-R.

The request also must contain a reasonable description of the record(s) requested. This will enable you or others in your office to research the request with more efficiency.

FOIA FEES

All fees related to an FOIA request must be paid by the organization or person making the request. For commercial requesters, fees are assessed for the search, review and duplication of the requested records. All fees $15 or under are automatically waived. However, in the case of educational institutions, noncommercial scientific institutions and news media representatives, fees can only be assessed for duplication (after the first 100 pages). All fees $15 and under may be waived.

FOIA ASSISTANCE

Occasionally, you will receive an FOIA request that does not meet the format previously described. Since

members of the public usually do not understand FOIA request procedures, it is up to you to help them.

TIME LIMITS

You must respond to FOIA requests within 10 working days. However, this may be an unrealistic length of time because of your work schedule. When this happens, you may take a formal time extension of up to 10 additional working days if you must take one or more of the following actions:

- Search for or collect records that are located, in whole or in part, at places separate from the office processing the request.
- Search for, collect and examine a substantial number of records in response to a request.
- Consult with another naval activity or another agency which has a substantial subject matter interest in the determination of the request.

If you opt for a formal time extension, advise the requester in writing and give the reason(s) for the extension. Also indicate that the requester may make an appeal to the appropriate appellate authority (such as the judge advocate general or general counsel) within 60 calendar days.

Keep in mind that formal time extension letters must be approved and signed by higher authority. In FOIA terminology, this person is called the initial denial authority (IDA).

The purpose of this section is to acquaint you with some of the basic provisions of the FOIA Program. More detailed information can be found in SECNAVINST 5720.42 series and in *PA Regs*, Chapter 7.

COPYRIGHT

LEARNING OBJECTIVE: Define copyright and recognize its provisions.

Another area of legal concern to the Navy journalist is the laws governing copyright, which, unlike libel laws, are federal statutes.

The copyright system is explained in detail in the Copyright Act of 1976 (Title 17 of the United States Code), which became effective on January 1,1978. This act was the first general revision of the copyright law of the United States since 1909. It made a number of changes in our copyright system, and for the most part, supersedes the previous federal copyright statute.

DEFINITION

Copyright, according to the act, is a form of protection provided by the federal government to the authors of "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device."

Works of authorship include the following categories:

- Literary works
- Musical works, including any accompanying words
- Dramatic works, including any accompanying music
- Pantomimes and choreographic works
- Pictorial, graphic and sculptural works
- Motion pictures and other audiovisual works
- Sound recordings

It should be noted, however, that "copyright protection for an original work of authorship does not extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work."

Some other categories of material generally not eligible for statutory copyright protection include the following:

- Works that have not been fixed in a tangible form of expression; for example, choreographic works that have not been notated or recorded, or improvisational speeches or performances that have not been written or recorded
- Titles, names, short phrases and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listings of ingredients or contents
- Works consisting entirely of information that is common property and containing no original authorship; for example, standard calendars, height and weight charts, tape measures and rules

and lists or tables taken from public documents or other common sources

Where copyright protection applies, it is available to both published and unpublished works. The Copyright Act generally gives the owner the exclusive right to do and to authorize others to do the following:

- To reproduce the copyrighted work in copies or phonorecords (phonorecords, for the purpose of this section, refers to material objects embodying fixations of sounds, such as cassette tapes, CDs or LPs)
- To prepare derivative works based upon the copyrighted work
- To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership or by rental, lease or lending
- To perform the copyrighted work publicly in the case of literary, musical, dramatic and choreographic works, pantomimes, motion pictures and other audiovisual works
- To display the copyrighted work publicly in the case of literary, musical, dramatic and choreographic works, pantomimes and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work

LIMITATIONS

It is illegal for anyone to violate any of the rights provided to the owner of copyright by the act. These rights, however, are not unlimited in scope. In some cases, these limitations are specified exemptions from copyright liability.

One major limitation is the doctrine of "fair use," which is now given a statutory basis by section 107 of the act, which states: the fair use of a copyright work, including such use by reproduction in copies or phonorecords or by any other means specified (in section 106 of the act), for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, you should consider the following factors:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes

2. The nature of the copyrighted work

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole

4. The effect of the use upon the potential market for or value of the copyrighted work

In other instances, the limitation takes the form of a "compulsory license" under which certain limited uses of copyrighted works are permitted upon payment of specified royalties and compliance with statutory conditions.

INFRINGEMENT

To use any of the exclusive rights of a copyright owner without permission is an infringement of copyright. Infringement is in violation of the law, and as such, it is punishable by the courts.

The owner of a copyright, upon proving that an infringement has occurred, can expect to recover from the offender any monetary loss suffered as well as any profit realized by the offender due to the infringement.

When a copyright is infringed by or for the U.S. government, the exclusive remedy of the copyright owner is, with the government's permission, to bring suit against the United States in the Court of Claims. Government employees, including military personnel, are not personally liable for copyright infringement occurring in the performance of their official duties. In cases involving Navy personnel, claims of copyright infringement may be settled before the time suit is brought by the Secretary of the Navy or his duly authorized representative, the Chief of Naval Research or his designee.

To avoid the possibility of infringement, the best policy is to request permission from the owner before using any copyrighted material. The basic guidance for the procedures to be followed in obtaining copyright permission is contained in *Permission to Copy Materials Subject to Copyright,* SECNAVINST 5870.5 series, which covers the use of copyrighted materials in Navy publications, motion pictures, audiotapes, and videotapes and similar works.

USE OF GOVERNMENT PUBLICATIONS

Any material published by or for the U.S. government, or any reprint in whole or in part thereof,

is generally considered to be in the public domain and not subject to copyright laws. However, when copyrighted material is used (with permission) in a government publication, it cannot be reproduced by a private citizen or in another government publication without again requesting permission from the copyright owner. Copyrighted material in a government publication must have a statement identifying the copyright holder and indicating that permission has been granted for its use.

COPYRIGHT OWNERSHIP

Copyright protection exists from the time the work is created in fixed form; that is, it is an incident of the process of authorship. The copyright in the work of authorship immediately becomes the property of the author who created it. Only the author or those deriving their rights through the author can rightfully claim copyright.

In the case of works made for hire, as is the case when military personnel or civilian employees of the federal government author a "work" on government time, the employer and not the employee is presumptively considered the author. Section 101 of the copyright statute defines a "work made for hire" as the following:

1. A work prepared by an employee within the scope of his employment.

2. A work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

The authors of a joint work are co-owners of the copyright in the work unless there is an agreement to the contrary.

Copyright in each separate contribution to a periodical or other collective work is distinct from copyright in the collective work as a whole and vests initially with the author of the contribution.

Mere ownership of a book, manuscript, painting or any other copy or phonorecord does not give the possessor the copyright. The law provides that transfer of ownership of any material object that embodies a protected work does not of itself convey any rights in the copyright.

Minors may claim copyright, but state laws may regulate the business dealings involving copyrights owned by minors. For information on relevant state laws, you may wish to contact your local bar association.

COPYRIGHT AVAILABILITY

Copyright protection is available for all unpublished works regardless of the nationality or domicile of the author.

Published works are eligible for copyright protection in the United States if any one of the following conditions is met:

- On the date of first publication, one or more of the authors is a national or domiciliary of the United States or is a national, domiciliary or sovereign authority of a foreign nation that is a party to a copyright treaty to which the United States also is a party or is a stateless person wherever that person may be domiciled.
- The work is first published in the United States or in a foreign nation that, on the date of first publication, is a party to the Universal Copyright Convention; or the work comes within the scope of a presidential proclamation.
- The work is first published on or after March 1, 1989, in a foreign nation that on the date of first publication, is a party to the Berne Convention; or, if the work is **not** first published in a country party to the Berne Convention, it is published (on or after March 1, 1989) within 30 days of first publication in a country that is party to the Berne Convention.
- The work is first published on or after March 1, 1989, and is a pictorial, graphic, or sculptural work that is incorporated in a permanent structure located in the United States; or, if the work, first published on or after March 1, 1989, is a published audiovisual work and all the authors are legal entities with headquarters in the United States.

SECURING A COPYRIGHT

The way in which copyright protection is secured under the present law is frequently misunderstood. No publication or registration or any other action in the Copyright Office is required for copyright to be secured under the new law. This differs from the old law, which

required either publication with the copyright notice or registration in the Copyright Office.

Before 1978, statutory copyright was generally secured by the act of publication with notice of copyright, assuming compliance with all other relevant statutory conditions. Works in the public domain on January 1,1978, (for example, works published without satisfying all conditions for securing statutory copyright under the Copyright Act of 1909) remain in the public domain under the current act.

Statutory copyright also could be secured before 1978 by the act of registration in the case of certain unpublished works and works eligible for ad interim copyright. The current act automatically extends to full-term copyright for all works in which ad interim copyright was existing or could be secured on December 31, 1977.

Under the new law copyright is secured automatically when the work is created, and a work is "created" when it is fixed in a copy or phonorecord for the first time. Generally, "copies" are material objects from which a work can be read or visually perceived either directly or with scripts, sheet music, film, videotape or microfilm. As mentioned earlier, phonorecords are material objects embodying fixations of sounds. 'his also applies to a work such as a song, fixed on sheet music ("copies"), CDs ("phonorecords") or both.

If a work is prepared over a period of time, the part of the work existing in fixed form on a particular date constitutes the created work as of that date.

PUBLICATION

Publication is no longer the key to obtaining statutory copyright as it was under the Copyright Act of 1909. However, publication remains important to copyright owners.

The Copyright Act defines publication as follows:

> "Publication is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership or by rental, lease or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication."

Further coverage of the definition of "publication" is contained in the legislative history of the act. The legislative reports define "to the public" as distribution to persons under no explicit or implicit restrictions with respect to disclosure of the contents. The reports state that the definition makes it clear that the sale of phonorecords constitutes publication of the underlying work; for example, the musical, dramatic or literary work embodied in a phonorecord.

The reports also state that it is clear that any form or dissemination in which the material object does not change hands — for example, performances or displays on television — is not a publication no matter how many people are exposed to the work. However, when copies or phonorecords are offered for sale or lease to a group of wholesalers, broadcasters or motion-picture theaters, publication does take place if the purpose is further distribution, public performance or public display.

Publication is an important concept in the copyright law for several reasons:

- When a work is published, it may bear a notice of copyright to identify the year of publication and the name of the copyright owner and to inform the public that the work is protected by copyright. Works published before March 1, 1989, **must** bear the notice or risk loss of copyright protection
- Works that are published in the United States are subject to mandatory deposit with the Library of Congress.
- Publication of a work can affect the limitations on the exclusive rights of the copyright owner that are set forth in sections 107 through 120 of the law.
- The year of publication may determine the duration of copyright protection for anonymous and pseudonymous works (when the author's identity is not revealed in the records of the Copyright Office) and for works made for hire.
- Deposit requirements for registration of published works differ from those for registration of unpublished works.

NOTICE OF COPYRIGHT

LEARNING OBJECTIVE: Recognize how a notice of copyright is displayed on a copyrighted work.

For works first published on and after March 1, 1989, use of the copyright notice is optional, though highly recommended. Before March 1, 1989, the use of the notice was mandatory on all published works, and any work first published before that date must bear a notice or risk loss of copyright protection. (The Copyright Office does not take a position on whether works first published with notice before March 1, 1989, and reprinted and distributed on and after March 1, 1989, must bear the copyright notice.)

Use of the notice is recommended because it informs the public that the work is protected by copyright, identifies the copyright owner, and shows the year of first publication. Additionally, in the event that a work is infringed, if the work carries a proper notice, the court will not allow a defendant to claim "innocent infringement" — that is, that he did not realize the work is protected (a successful innocent infringement claim may result in a reduction in damages that the copyright owner would otherwise receive).

The use of the copyright notice is the responsibility of the copyright owner and does not require advance permission from, or registration with, the Copyright Office.

FORM OF NOTICE FOR VISUALLY PERCEPTIBLE COPIES

The notice for visually perceptible copies should contain the following three elements:

- **The symbol** © (the letter C in a circle), the word "Copyright" or the abbreviation "Copr."
- **The year of first publication of the work.** In the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic or sculptural work, with accompanying textual matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys or any useful articles.
- **The name of the owner of copyright** in the work, an abbreviation by which the name can be recognized or a generally known alternative designation of the owner. Note the following example:

  © 1993 Jack Crevalle

The "C in a circle" notice is required only on "visually perceptible copies." Certain kinds of works, for example, musical, dramatic and literary works, may be fixed not in "copies" but by means of sound in an audio recording. Since audio recordings, such as audiotapes and phonograph discs, are "phonorecords" and not "copies," there is no requirement that the phonorecord bear a "C in a circle" notice to protect the underlying musical, dramatic or literary work that is recorded.

FORM OF NOTICE FOR PHONORECORDS OF SOUND RECORDINGS

The copyright notice for phonorecords of sound recordings has somewhat different requirements. The notice appearing on phonorecords should contain the following three elements:

- **The symbol** ℗ (the letter *P* in a circle)
- **The year of first publication** of the sound recording
- **The name of the owner of copyright** in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. When the producer of the sound recording is named on the phonorecord labels or containers and when no other name appears in conjunction with the notice, the producer's name should be considered a part of the notice. Consider the following example:

  ℗ Jack Crevalle

POSITION OF NOTICE

The notice should be affixed to copies or phonorecords of the work in such a manner and location as to "give reasonable notice of the claim of copyright." The notice on phonorecords may appear on the surface of the phonorecord or on the phonorecord label or container, provided the manner of placement and location gives reasonable notice of the claim. The three elements of the notice should ordinarily appear together on the copies or phonorecords.

PUBLICATION INCORPORATING UNITED STATES GOVERNMENT WORKS

Works by the U.S. government are not eligible for copyright protection For works published on and after March 1, 1989, the previous notice requirement for

works consisting primarily of one or more U.S. government works has been eliminated. However, use of the copyright notice for these works is still strongly recommended. The use of a notice on such a work will defeat a claim of innocent infringement, as previously described, **provided** the notice also includes a statement that identifies one of the following:

- Those portions of the work in which copyright is claimed.
- Those portions that constitute U.S. government material. Note the following example:

  © 1993 Jack Crevalle. Copyright claimed in Chapters 7-10, exclusive of U.S. government maps.

Works published before March 1, 1989, that consist primarily of one or more works of the U.S. government **must** bear a notice and the identifying statement.

UNPUBLISHED WORKS

The copyright notice is not required on unpublished works. To avoid an inadvertent publication. without notice, however, it may be advisable for the author or other owner of the copyright to affix notices to any copies or phonorecords that leave his control.

CORRECTING ERRORS AND OMISSIONS

Unlike the law that was in effect before 1978, sections 405 and 406 in the new Copyright Act provide procedures for correcting errors and omissions of the copyright notice on works published on or after January 1, 1978, and before March 1, 1989.

Generally, the omission or error does not automatically invalidate the copyright in a work if registration for the work has been made before, or is made within five years after the publication without notice. Also, to add the notice to all copies or phonorecords distributed to the public in the United States after the omission has been discovered, a reasonable effort is required.

Before 1978 (as a condition for copyright protection), the copyright law required all copies published with the authorization of the copyright owner to bear a proper notice. When a work was published under the copyright owner's authority before January 1, 1978, without a proper copyright notice, all copyright protection for that work was permanently lost in the United States. The new copyright law does not provide retroactive protection for those works.

COPYRIGHT REGISTRATION

LEARNING OBJECTIVE: Recognize the procedures used to obtain a copyright and the rules that apply to the copyright owner.

Generally, copyright registration is a legal formality intended to make a public record of the basic facts of a particular copyright. However, except in one specific situation, registration is not a condition of copyright protection. That exception is contained in sections 405 and 406 of the Copyright Act. The act provides that copyright registration may be required to preserve a copyright that would otherwise be invalidated because of the omission of the copyright notice from the published copies or phonorecords, omission of the name or date or a certain error in the year date.

Even though registration is not generally a requirement for protection, the copyright law provides several inducements or advantages to encourage copyright owners to register. Some of these advantages are as follows:

- Registration establishes a public record of the copyright claim.
- Before an infringement suit maybe filed in court, registration is necessary for works of U.S. origin and for foreign works not originating in a Berne Union country.
- If made before or within five years of publication, registration will establish prima facie evidence in court of the validity of the copyright and of the facts stated in the certificate.
- If registration is made within three months after publication of the work or before an infringement of the work, statutory damages and attorney's fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner.

Registration may be made at any time within the life of the copyright. Unlike the law before 1978, when a work has been registered in unpublished form, another registration is not necessary when the work is published, although the copyright owner may register the published edition, if desired.

REGISTRATION PROCEDURES

If you choose to register your work, you should send the following three elements to the Copyright Office in the same envelope or package:

- A properly completed application form
- A fee of $20 for each application
- A deposit of the work being registered

The deposit requirements will vary in particular situations. The general requirements are as follows:

- If the work is unpublished one complete copy or phonorecord
- If the work was published in the United States on or after January 1, 1978, two complete copies or phonorecords of the best edition
- If the work was first published in the United States before January 1, 1978, two complete copies or phonorecords of the work as first published
- If the work was first published outside the United States, whenever published one complete copy or phonorecord of the work as first published
- If the work is a contribution to a collective work and published after January 1, 1978, one complete copy or phonorecord of the best edition of the collective work

NOTE: The Copyright Office has the authority to adjust fees at five-year intervals, based on changes in the Consumer Price Index. Contact the Copyright Office for the most current fees.

COPYRIGHT DURATION

A work that is created (fixed in tangible form for the first time) on or after January 1, 1978, is automatically protected from the moment of its creation and is ordinarily given a term enduring for the author's life — plus an additional 50 years after the author's death. In the case of "a joint work prepared by two or more authors who did not work for hire," the term lasts for 50 years after the last surviving author's death. For works made for hire and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the duration of copyright will be 75 years from publication or 100 years from creation, whichever is shorter.

Works that were created, but not published or registered for copyright before January 1, 1978, automatically have been brought under the statute and are now given federal copyright protection. The duration of copyright in these works generally is computed in the same way as for works created on or after January 1, 1978; the life-plus-50 or 75/100-year terms will apply to them as well. The law provides that in no case will the term of copyright for works in this category expire before December 31, 2002, and for works published on or before December 31, 2002, the term of copyright will not expire before December 31, 2027.

Under the law in effect before 1978, copyright was secured either on the date a work was published or on the date of registration if the work was registered in unpublished form. In either case, the copyright lasted for a first term of 28 years from the date it was secured. During the last (28th) year of the first term, the copyright was eligible for renewal. The current copyright law has extended the renewal term from 28 to 47 years for copyrights that were subsisting on January 1, 1978, making these works eligible for a total term of protection of 75 years.

Public Law 102-307, enacted on June 26, 1992, amended the Copyright Act of 1976 and automatically extended the term of copyrights secured between January 1, 1964, and December 31, 1977 to the further term of 47 years and increased the filing fee from $12 to $20. This fee increase applies to all renewal applications filed on or after June 29, 1992.

Under Public Law 102-307, renewal registration is optional. There is no need for the renewal filing to be made in order for the original 28-year copyright term to be extended to the full 75 years. However, some benefits accrue to making a renewal registration during the 28th year of the original term.